Supreme Court, U.S.
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No. 01-34

IN THE

Supreme Court of the United States

SIEGEL-ROBERT, INC.,
Petitioner,

v.

THOMAS W. SWOPE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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Respondents' Brief in Opposition strives mightily to obfuscate the two legal issues clearly posed by our petition and to suggest disingenuously that the Questions Presented deal with nothing other than factual issues and state-law questions. Respondents also misleadingly characterize the Questions Presented as "mutually contradictory" (Br. 8), which reflects, at best, a misapprehension of the issues.

The two Questions Presented are indeed squarely framed by the Eighth Circuit's opinion and raise *legal* issues under *federal* law — the *Erie* doctrine — which are substantial, recurring, and the source of conflict among the Circuits. The first Question stems from the Court of Appeals' holding that fair market value is totally irrelevant to a determination of fair value under Missouri law. The Missouri Supreme Court has specifically held that "fair value" and "fair market value" have the same general meaning in dissenters' rights cases. *Phelps v. Watson-Stillman Co.*, 293 S.W.2d 429, 433 (Mo. 1956). Hence, the Eighth Circuit's absolute refusal to consider any valuation based on fair market value (including the IRS appraisal of the majority block of petitioner's stock) constitutes an express rejection of controlling Missouri law and an outright *Erie* violation. The first Question is thus squarely presented, and neither respondents' rhetoric nor rationalizations will make it go away.

The second Question Presented arises from a different valuation issue — the availability of a minority discount under Missouri law. On this issue the Missouri Supreme Court has not spoken, but the intermediate Court of Appeals has specifically endorsed minority discounts in *King v. FTJ, Inc.*, 765 S.W.2d 301, 305 (Mo. App. 1989). The Eighth Circuit expressly refused to

follow *King*, choosing instead to adopt the rationale of cases from other states (especially Delaware) even though the Missouri Supreme Court (a) had declined discretionary review in *King*, (b) had never criticized minority discounts or the rationale of *King*, and (c) had pronounced Delaware decisions as "not persuasive" on this issue. *See Flarsheim v. Twenty Five Thirty Two Broadway Corp.*, 432 S.W.2d 245, 259 (Mo. 1968).

In this context, it is preposterous for respondents to characterize the issues in this case as ones of "first impression" (Br. 2) or to portray the Eighth Circuit's analysis as consistent with "prior Missouri 'fair value' decisions" (Br. 3). The Court of Appeals' declaration that fair market value is irrelevant flatly disregards the holding of *Phelps*, and the Eighth Circuit itself acknowledged that it was refusing to follow Missouri's intermediate appellate court decisions on the issue of discounts, based on "persuasive" Delaware decisions and "influenced by the logic of other state courts" (A-19).[1]

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[1] Respondents' contention that "every other reported Missouri fair value decision" except *King* used "enterprise" value (Br. 11) is demonstrably wrong — the term "enterprise value" is not contained in any such opinion, and the valuations appear to include discounts for lack of marketability or minority status, or both. Respondents, furthermore, do not offer any reasoned explanation why the recognition of marketability and minority discounts by the Missouri Supreme Court in *Hoffman v. Hoffman*, 676 S.W.2d 817 (Mo. banc 1984), and by the Missouri Court of Appeals in *Stein v. Stein*, 781 S.W.2d 87 (Mo. App. 1990), is not at least a "fact or circumstance" required to be considered in a valuation of dissenters' shares.

The Questions Presented are independent of the size of the record, the length of the trial, the nuances of Missouri statutory law, or the facts of the case. They present clean and important legal issues about the power of federal courts to rewrite state law. Because this case involves the issue of federal deference to both state supreme courts and state appellate courts, it affords this Court a unique opportunity to clarify and re-emphasize the limitations imposed by principles of federalism on the state-law-making abilities of federal judges.

Respectfully submitted,

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